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## **Smoking Gun: Receiving Property Stolen by a Client**

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Oregon has long had very specific guidance for lawyers confronted with clients who ask them to take possession of stolen property or other evidence of a crime: “Just say ‘no.’” When the Oregon State Bar comprehensively revised its ethics opinions in 1991, Opinion 1991-105 provided that succinct answer under the then-applicable Disciplinary Rules. When the OSB then undertook an equally comprehensive update of its ethics opinions in 2005 following the adoption of the Rules of Professional Conduct, Opinion 2005-105 retained this same simple answer. What has changed over the years, however, is that this topic is no longer the sole province of criminal defense lawyers. Although both the 1991 and the 2005 opinions use the example of a murder weapon, today's "smoking gun" might just as easily be a stolen email that is playing out in the context of civil litigation. In this column, we'll look both at Oregon's approach to this issue and the changing context in which it may arise.

### ***Just Say “No”***

Both the 1991 and the 2005 opinions draw a distinction between information and evidence. They both counsel that *information* linking a client to a crime normally falls within the confidentiality rule—now RPC 1.6—and generally cannot be disclosed. At the same time, they both conclude that a lawyer

ordinarily cannot accept *evidence* of a crime from a client in light of Oregon’s broad prohibition on concealing evidence under ORS 162.295(1)(a). That statute, which has existed in its present form since 1971, includes concealing evidence within the crime of evidence tampering if an “official proceeding” is either “pending or to the knowledge of such person is about to be instituted[.]” The opinions reason that to do so would constitute conduct prejudicial to the administration of justice, which was prohibited under former DR 1-102(A)(4) and is now proscribed by RPC 8.4(a)(4). The two exceptions the opinions note are situations in which the lawyer either accepts stolen property to return it to the owner or accepts evidence to turn it over to the authorities. The 2005 opinion adds (at 258-59) that under this latter exception “[a] lawyer may . . . deliver the weapon to the prosecutor anonymously or through an intermediary to avoid implicating the lawyer’s client.” The 2005 opinion is available on the OSB web site at [www.osbar.org](http://www.osbar.org).

### ***Changing Contexts***

As noted, both the 1991 and the 2005 opinions are framed against the backdrop of a murder weapon—literally and figuratively the proverbial “smoking gun.” In today’s “electronic” environment, however, the “smoking gun” might also be a stolen hard drive or illegally intercepted electronic data. Moreover, rather than arising in the classic setting of criminal defense, today’s backdrops may more likely be family, employment or commercial litigation. *Pittman v. Travelers*

*Indemn. Co.*, No. CV-06-147-ST, 2006 WL 1643655 (D Or June 7, 2006) (unpublished), for example, examined (at \*7) ORS 162.295 in the context of a personal injury case that included workers compensation and insurance coverage components as well.

For lawyers who do not practice criminal law, the key to handling this situation effectively is often recognizing the issue in the first place. For example, a family lawyer may find him or herself grappling with this issue if a client has stolen a computer from a soon to be ex-spouse and the ex-spouse has both raised the asserted theft in the family law proceeding and reported it to the local police. Similarly, an employment lawyer may be dealing with a situation where the lawyer's client is both accused of stealing company property in the form of electronically stored information and violating a non-compete in setting up a new business using that information. The family and employment lawyers in these examples need to be just as attuned to the legal and ethical import of electronic "smoking guns" as their criminal defense colleagues are to their more literal counterparts.

#### **ABOUT THE AUTHOR**

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